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In the Supreme Court of the United States

October Term, 1973

**UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS**

**VS.
MIDWEST VIDEO CORPORATION**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AND THE FEDERAL
COMMUNICATIONS COMMISSION**

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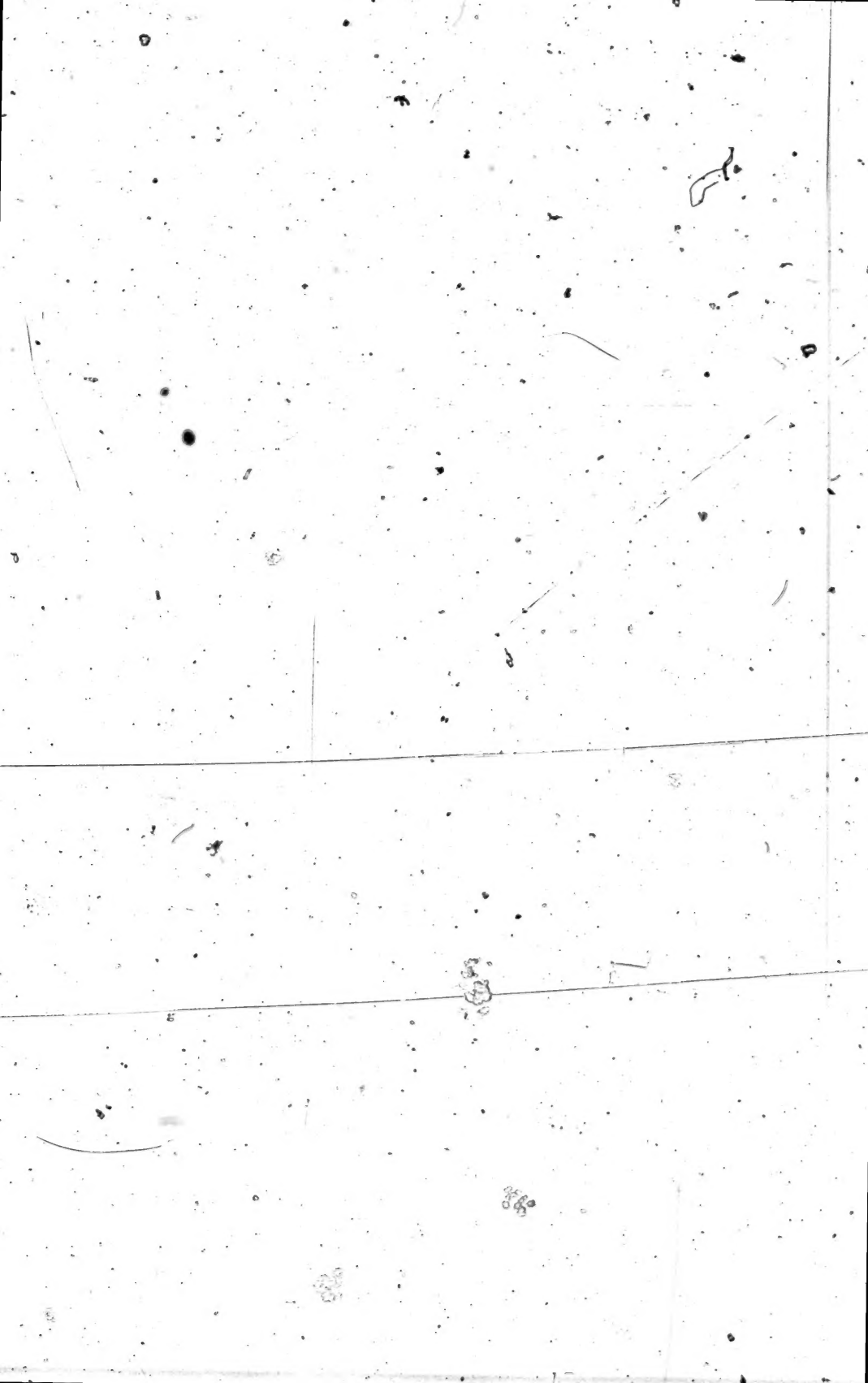
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-29) is reported at 441 F. 2d 1322. The orders of the Federal Communications Commission (Pet. App. C, D, and E, pp. 31-67) are reported at 20 F.C.C. 2d 201, 23 F.C.C. 2d 825, and 27 F.C.C. 2d 778.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1971 (Pet. App. B, p. 30). By order of Mr. Justice Blackmun, the time within which to petition for a writ of certiorari was extended to October 9,

1971. The petition was filed on October 8, 1971, and granted on January 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's rule requiring community antenna television systems with 3,500 or more subscribers to originate programming is within the Commission's statutory authority.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a), 3(b), 3(d), 4(i), 301, 303 (g), 303(r), 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152 (a), 153(a), 153(b), 153(d), 154(i), 301, 303(g), 303 (r), 307(b), are set forth in the Appendix to this brief (*infra*, pp. 23-27). The rule under review is also set forth in the Appendix, *infra*, pp. 27-28.

STATEMENT

This case arises from an order of the Federal Communications Commission adopting a rule requiring community antenna television (CATV) systems with more than 3,500 subscribers, as a condition for the carriage of television broadcast signals, to originate programming and to make available facilities for local program production. The court of appeals held that the Commission lacks statutory authority to require program origination.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court held that CATV systems engage in "interstate * * * communication" by wire or radio"

within the meaning of Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), and that the Federal Communications Commission therefore has regulatory jurisdiction over CATV at least insofar as its regulation is "reasonably ancillary" to its regulation of the broadcast industry. Shortly thereafter the Commission launched a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services * * *." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C. 2d 417; 33 Fed. Reg. 19028 (App. 3-50).¹ In particular, the Commission requested comments on whether it should require CATV systems to originate programming; whether advertising should be permitted; and whether the broadcast concepts of "equal time", "fairness" and sponsorship identification ought also to apply to CATV.²

On October 24, 1969, the Commission issued a report, 20 F.C.C. 2d 201, Pet. App. C, pp. 31-56, dealing with the subject of program origination, or "cablecasting", by CATV systems. In this report, the Commission adopted a rule which provides that a CATV system

¹ "It now appears," the Commission noted, that "cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned." *Id.* at 418 (App. 8).

² Other areas of inquiry included cross-ownership of television stations and CATV systems; use of CATV channels to provide common carrier service; and importation of distant signals into major markets.

having 3,500 or more subscribers³ may not distribute the signals of television broadcast stations unless it also operates "to a significant extent as a local outlet by cablecasting" and by having available "facilities for local production and presentation of programs other than automated services" (Pet. App. C, p. 53).⁴ The Commission had observed in its Notice of Rulemaking that the CATV industry was placing increased emphasis on program origination, including both local public service and entertainment programs, and on providing other nonbroadcast services to the public such as time, weather, and news reports and advertising.⁵ On the

³ In setting 3,500 subscribers as a feasible minimum size for systems required to originate programs, the Commission took into account record evidence on the estimated cost of constructing and operating cablecasting systems of varying degrees of sophistication and industry statistics which showed that 70% of the cablecasting systems currently originating programs had less than 3,500 subscribers and more than 50% had less than 2,000 subscribers. 20 F.C.C. 2d 201, 209-214 (Pet. App C, pp. 39-44).

⁴ In addition, the Commission adopted rules limiting advertising messages to the beginning and end of each cablecast program and to natural breaks or intermissions within the program, and rules designed to achieve diversity in programming. Also adopted were regulations similar to those which the Communications Act and Commission rules make applicable to broadcasters with respect to cablecasts by candidates for public office, programs dealing with controversial issues of public importance and sponsorship identification of matter the system has been paid to cablecast (cf. 47 U.S.C. 315, 317).

⁵ The Commission also referred to its earlier consideration of the subject in a CATV hearing involving the San Diego area. *Midwest Television, Inc.*, 13 F.C.C. 2d 478, affirmed, *Midwest Television, Inc. v. F.C.C.*, 426 F. 2d 1222 (C.A.D.C.). In that case the Commission authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage "of broadcast signals

basis of the comments submitted in the rule-making proceeding the Commission concluded that CATV program origination serves the public interest by providing program diversity and creating outlets for self-expression, particularly in those areas where the establishment of broadcast stations has not proven feasible (Pet. App. C, pp. 43-44), and that the most effective way to encourage cablecasting would be to condition "where practicable, the carriage of broadcast signals upon a requirement for program origination" (Pet. App. C, p. 38).

The Commission justified the exercise of its jurisdiction to require program origination on the ground that

The use of broadcast signals, has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to "encourage the larger and more effective use of radio in the public interest"

by one system upon a requirement that it operates to a significant extent as an outlet for noncommercial community self-expression." 13 F.C.C. 2d at 510. The Commission there noted at some length (*id.* at 503-508) the benefits to be gained from program origination, in particular the increase it would provide in the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service. The Commission also pointed out in that case that "CATV program origination does not entail the question of 'unfair competition' posed by CATV importation of broadcast signals from another market (*Second Report*, 2 F.C.C. 2d at 778-781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations." *Id.* at 506.

([47 U.S.C.] 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities ([47 U.S.C. 307(b)], in areas where we have been unable to accomplish this through broadcast media.

20 F.C.C. at 208; Pet. App. C, pp. 38-39.

Upon the challenge of respondent, an operator of CATV systems in Missouri, New Mexico, and Texas, the court of appeals set aside the program origination requirement on the ground that the Commission did not have the statutory authority to adopt it. Citing *Southwestern Cable, supra*, the court held that the cablecasting requirement is not "ancillary" to the Commission's responsibilities in the broadcast field and hence that program origination by CATVs is beyond the scope of the Commission's jurisdiction. The court rejected the Commission's contention that the Communications Act was intended to confer unified jurisdiction and broad authority over all of the nation's wire and radio communication systems.⁶ Judge Gibson concurred in the result, concluding that while the Commission has the necessary authority over CATV to adopt the rule in question, and while the rule "is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time" (Pet. App. A, p. 28).

⁶ The court did not pass on the other rules relating to program origination, stating that since the petitioner could not be compelled to cablecast, it lacked standing to challenge rules regulating cablecasting.

SUMMARY OF ARGUMENT

Congress created the Federal Communications Commission in 1934 for the purpose of centralizing into one agency regulatory authority over the developing radio communications industry. The language of Section 2(a) of the Communications Act, 47 U.S.C. 152 (a), which extends the Commission's jurisdiction to "all interstate and foreign communication by wire or radio," indicates that Congress intended to provide for regulation of new developments, as well as then-existing technology, in the continuously evolving uses of wire and radio.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court noted that CATV systems engage in "interstate communication by wire or radio," and that the Commission has jurisdiction to regulate CATV even though cable systems were developed subsequent to the passage of the Act and are not specifically referred to in the Act's provisions. Referring to the legislative history of the Act, the Court emphasized Congress' desire to assure unified regulation of all forms of radio and wire communication. In this respect, the Court's opinion supports the view that the Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry. Indeed, except for certain special problems applicable to the allocation of the limited resources of the broadcast spectrum, there is as much need for the Commission's regulation of CATV as of broadcasting in light of the essential similarity of service offered to the television viewer.

Even though it indicated a very broad view of the Commission's jurisdiction to regulate CATV, the Court noted in *Southwestern* that it was not required to define the full scope of that jurisdiction, but merely to decide whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. In our view, the present case also does not require the Court to determine whether the Act confers on the Commission full authority to regulate CATV in the absence of any substantial connection with the broadcast industry, for the regulation held invalid by the court below applies only to CATV systems "which carry the signal of any television broadcast station". Even if Commission regulation of CATV must be substantially related to regulation of broadcasting, the requisite relationship is present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters. Indeed, the conditioning of broadcast signal transmission on program origination properly implements Congress' directive that the Commission shall "[s]tudy new uses for radio * * * and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

In its recent study of the operation of state and local regulation of the rapidly growing CATV in-

dustry, the Commission concluded that to the extent that local regulation has proceeded without federal guidelines, the result has been "confusion" and a "patchwork of disparate approaches * * *." 37 Fed. Reg. 3275. In our view, the Communications Act was specifically designed to prevent this kind of chaos from occurring in the communications field. The Commission has recently promulgated regulations which set forth standards to be followed by state or local franchising authorities in order to ensure that local CATV franchising proceedings will be conducted in conformity with the Commission's view of the public interest standards reflected in the Communications Act. Like the program origination rule, these regulations illustrate the Commission's intention to integrate cable systems which transmit broadcast signals into the national communications system in a way that will encourage use of all available communications technology in furtherance of the objectives of the Communications Act.

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION'S RULE REQUIRING CATV OPERATORS WHO TRANSMIT BROADCAST SIGNALS ALSO TO ORIGINATE PROGRAMS IS WITHIN THE COMMISSION'S STATUTORY AUTHORITY

The cablecasting rule is part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. Until recently, the Commission's regulation of CATV sought primarily to prevent cable television from unfairly undermining the foundation of existing over-the-air broadcast services. The cable-

casting rule which respondents attack in this case seeks to supplement current communications service by requiring CATV systems which transmit broadcast signals to provide additional diversity of programming. See *infra*, pp. 14-15. The decision below, holding that the Commission lacks jurisdiction to require cablecasting by CATV systems, is, in our view, contrary to the rationale of the Federal Communications Act of 1934 and inconsistent with this Court's view of that Act as expressed in *United States v. Southwestern Cable Co.*, 392 U.S. 157.

1. Congress created the Federal Communications Commission in 1934 for the purpose of "centralizing authority heretofore granted by law to several agencies and * * * granting additional authority" in order to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities * * *". Section 1, 47 U.S.C. 151. Under Section 2(a) of the Act, 47 U.S.C. 152(a), the Commission's authority extends to "all interstate and foreign communication by wire or radio" and "to all persons engaged within the United States in such communication."

The scheme of regulation created by the Act is not, as the decision below implies, restricted to forms of wire and radio communication in use at the time the Act was passed; rather, the Act was also designed to provide for regulation of new developments in the continuously evolving uses of wire and radio. With respect to both technological and economic regulation the Commission is given comprehensive powers "to promote and realize the vast potentialities of radio."

National Broadcasting Co. v. United States, 319 U.S. 190, 217; see *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. Thus, with respect to the Commission's rulemaking powers, Section 4(i), 47 U.S.C. 154(i), contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." These rulemaking powers are "coterminous with the scope of agency regulations * * *." *American Trucking Assns. v. United States*, 344 U.S. 298, 311; see *id.* at 309-311.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court upheld the Commission's authority to stay CATV transmission of distant broadcast signals, pending a hearing, into the one hundred largest television markets. The Court first noted that CATV systems engage in "interstate * * * communication by wire or radio" within the meaning of Section 2(a) of the Act. 392 U.S. at 168-196. Then, rejecting the contention that the Act "limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions," 392 U.S. at 172, the Court emphasized Congress' intention, as reflected in the legislative history, that all branches of the wire or radio communica-

⁷ Section 303(r), 47 U.S.C. 303(r), similarly grants the Commission authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

tions industry be subject to a unified regulatory system:

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication * * *". S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138, that it conferred upon the Commission a "unified jurisdiction"⁸ and "broad authority."⁹ Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *." [392 U.S. at 172-173; footnotes renumbered.]

⁸ "S. Rep. No. 781, *supra*, at 1" (footnote by the Court).

⁹ "H.R. Rep. No. 1850, *supra*, at 1" (footnote by the Court).

The Court's emphasis of Congress' desire to assure unified regulation of all forms of radio and wire communication, reflected in the quoted portions of the *Southwestern* opinion, supports the view that the Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry.¹⁰ Indeed, it seems logical that if Congress had foreseen the development of CATV it would have wanted that industry to be regulated in furtherance of the same policy objectives that obtain with respect to the broadcast industry.¹¹ It is true, of course, that reg-

¹⁰ While we recognize that "the views of one Congress as to the construction of a statute adopted many years before by another Congress" are by no means controlling, *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 170, we note that the current Congress appears to assume that the Commission has broad authority to regulate CATV. Section 104 of the Federal Election Campaign Act of 1971, Public Law No. 92-225, imposes limitations on expenditures for use of "broadcasting stations" in connection with certain federal elections. Section 104(f)(1) (A) specifies that the term "broadcasting station" includes for these purposes a CATV system. The conference report on the bill notes that the original Senate bill contained a provision requiring broadcasting stations to file reports on candidate expenditures if required to do so by Commission regulations. The House amendment contained no reporting provision. At conference, the reporting provision was deleted "because the FCC has adequate authority to require reports under existing law." S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess., p. 26. Since the substantive provisions of Section 104 are explicitly applicable to expenditures for use of CATV systems, the implication of this explanation by the conference committee is that "existing law", by which the committee must have meant the Communications Act, empowers the Commission to impose reporting requirements on CATV operators.

¹¹ Of course, "Congress in passing the Communications Act of 1934 could not * * * anticipate the variety and nature of methods of communication by wire or radio that would come

ulation of broadcasting must take account of the need to allocate the limited resources of the broadcast spectrum. In all other respects, however, there is as much need for the Commission's regulation of CATV as of broadcasting. This is especially apparent from the standpoint of the television viewer, who can easily flip the dial between broadcasting and cablecasting channels. If cablecasters, for example, were free to present only one side of a controversial issue or to give time only to the candidates of one party, the overall effect of the Commission's equal opportunities and fairness doctrine (see 47 U.S.C. 315) would be undermined. Similarly, the public's need for diversified programming, reflected in the program origination requirement under attack in this case, is applicable both to broadcasters and CATV operators.

into existence in the decades to come." *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F. 2d 282, 284 (C.A.D.C.). Accordingly, "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly, but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 249; see also *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. In exercising these powers, the Commission "is entitled to latitude in coping with new developments in that industry," *Philadelphia Television*, *supra*, 359 F. 2d at 284 (in which the court sustained the Commission's decision not to regulate CATVs as common carriers). As the court there stated (359 F. 2d at 284), "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." See also *General Telephone Company of California v. Federal Communications Commission*, 413 F. 2d 390 (C.A.D.C.), certiorari denied, 396 U.S. 888.

Indeed, the new technology of cablecasting, which is available to CATV operators who at present are deriving their basic or sole economic nurture from broadcasting (see *infra*, pp. 16-17), presents a means of expanding program diversification beyond the limits previously imposed by the physical limitations of the broadcast spectrum. Hence the promotion of effective use of CATV's communications potential is now, in our view, a significant aspect of the Commission's statutory responsibility to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)) and to provide a "fair, efficient, and equitable distribution of television service" to the various "states and communities" (47 U.S.C. 307 (b)).¹²

2. Even though it indicated a very broad view of the Commission's jurisdiction to regulate CATV, the Court noted in *Southwestern* that it was not required to define the full scope of that jurisdiction, but merely had to decide whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commis-

¹² Because of the close functional relationship between CATV and the broadcast industry, and the equal applicability of most of the public interest concepts of the Act to both forms of communication, we submit that *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, referred to by the court below, is inapposite here. In *Frost* the Court held unconstitutional an order of the California Railroad Commission requiring that applicants for permission to become private automobile carriers for hire agree to operate also as common carriers and to submit to the full regulatory scheme applicable to common carriers.

sion's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. Relying upon this cautionary language, the court of appeals seems to have concluded that the Commission's regulation in the CATV area must be designed only to prevent harmful competitive effects on the broadcast industry; and that regulation of CATV for the purpose of assuring that CATV systems adhere to the same public interest standards that are applicable to broadcasters is inappropriate.

In our view, the present case also does not require the Court to determine whether the Act confers on the Commission full authority to regulate CATV in the absence of any substantial connection with the broadcast industry. There is no need here, for example, for the Court to determine whether the Commission has regulatory jurisdiction over wire communications systems whose operation does not involve the transmission of broadcast signals. For the regulation held invalid by the court below applies only to CATV systems "which carry the signal of any television broadcast station," and operates only to preclude the transmission of broadcast signals in the absence of a cablecasting program. Even if Commission regulation of CATV must be "reasonably ancillary" or substantially related in some way to regulation of broadcasting, there is no reason to believe that Congress intended to restrict the Commission to regulation designed to prevent deleterious competition with the broadcasting industry.

Indeed, the CATV systems to which this regulation is applicable are largely dependent for their existence

upon the broadcast signals that they pick up, and transmit. See Pet. App. C. p. 52. Cf. *United States v. Southwestern Television, supra*, 392 U.S. at 161-162. Having become "an integral part of interstate broadcast transmission," CATV operators "cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of California v. Federal Communications Commission*, 413 F.2d 390, 401 (C.A.D.C.) (per Burger, J.), certiorari denied, 398 U.S. 888; see also *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7; *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Thus, even if there must be some relation between the Commission's regulation of CATV and its responsibilities in the broadcasting area, the requisite nexus is surely present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters. Indeed, in the context of present technological possibilities, the conditioning of broadcast signal transmission on program origination properly implements Congress' directive that the Commission shall "[s]tudy new uses for radio * * * and generally encourage the larger and more effective use of radio in the

public interest." 47 U.S.C. 303.(g).¹³ For, as previously noted, cablecasting by CATV operators now provides a practical means for augmenting program diversification beyond the limitations inherent in the broadcast spectrum—a means that will be wasted if CATV operators are permitted to transfer the same limitations into their own activities by restricting their operations to the transmission of broadcast materials.

3. Though the holding below is based on jurisdictional grounds and the court referred to the "reasonably ancillary" language of the *Southwestern* case, most of the court's opinion deals with the court's view of the wisdom of the program origination requirement, which it considered economically burdensome to cablecasters.¹⁴ This factor, of course, bears not upon the

¹³ Moreover, since CATV systems are engaged in "the transmission of * * * signals by radio," within the meaning of 47 U.S.C. 301, the Commission is empowered to license their operation and to subject them to the licensing standards applicable to any other transmitter of radio signals. See 47 U.S.C. 303(r). The Commission has not yet undertaken to license CATV operators in the same manner as it licenses broadcasters, but does require CATV operators to obtain certificates of compliance, see *infra*, p. 21.

¹⁴ The record before the Commission, however, does not support this conclusion. In considering the financial impairment contentions of the parties, the Commission noted that the record contained "no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability * * *". The Commission pointed out that 70% of the systems already originating programs had fewer than 3,500 subscribers. Moreover, the court failed to consider either the available data on costs before the Commission or the fact that the cablecasting requirement is very flexible (23 F.C.C. 2d at 826-827) and includes specific guidelines for waiver of the requirement if cablecasting would in fact be financially injurious to a system. 27 F.C.C. 778, 779-780.

Commission's jurisdiction, but upon the reasonableness of the regulation. We do not contend that the Commission's authority to regulate CATV is exempt from the requirement of reasonableness and we recognize that the question of the reasonableness of regulation in the CATV area might in some situations depend upon factors different from those present in the regulation of broadcasting. We submit, however, that the restriction by the court below of the Commission's *jurisdiction* to regulate the operation of CATV systems which are involved in the transmission of broadcast signals is contrary to Congress' intention, recognized by this Court, to establish a unified system of regulation of "radio and wire" communications services.

Indeed, denial of jurisdiction in the Commission to regulate CATV systems which transmit broadcast signals would open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve. Cf. *General Telephone Co. of California v. Federal Communications Commission*, *supra*, 413 F.2d at 402. The CATV industry has grown at an extraordinarily rapid rate in recent years. There are now more than 2,500 CATV systems in operation (*Television Factbook*, 1971-1972, Services Volume, p. 18a), servicing an estimated 15 to 20 million viewers per day. In addition there are more than 2,000 CATV franchises outstanding for systems which are not currently operating, and approximately 2,600 franchise applications pending. *Addenda to Television Factbook*, Vol. 11-40, October 4, 1971. While

the growth of CATV is still accelerating, its enormous potential as a communication service to the public is now in clear enough focus to underscore the need for unified nation-wide regulatory authority at least to the extent that CATV systems draw their sustenance from broadcast signals. The alternative to Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 211-214. Although CATV itself had not yet been developed and was not specifically considered by Congress at that time, it was the purpose of the Communications Act to confer sufficient authority on the Commission to prevent this kind of chaos from occurring again in the communications field.

The cablecasting rule is, accordingly, part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. The Commission has recently studied the operation of state and local regulation of CATV and has concluded that, to the extent that local regulation has proceeded without federal guidelines,

This has resulted in a patchwork of disparate approaches affecting the development of cable television. While the Commission was pursuing a program to promote national cable policy, state and local governments were formulating policies to reflect local needs and desires. In many respects this dual approach worked well.

To a growing extent, however, the rapid expansion of the cable television industry has led to overlapping and sometimes incompatible regulations. This resulted in confusion, and we faced an obvious need to clarify the respective federal, state, and local regulatory roles. [37 Fed. Reg. 3275]

See also Note, *Regulation of Community Antenna Television*, 70 Columbia Law Review 837, 850-853.

In this connection, the Commission has recently promulgated regulations, for example, requiring a cable system which transmits broadcast signals to file a copy of its franchise with the Commission and a certificate showing that the franchising authority has held a public proceeding to consider the system operator's legal and financial qualifications and the adequacy of the system's construction arrangements. The Commission has also set forth standards to be followed by state or local franchising authorities in order to ensure that the local proceeding will be consistent with the Commission's view of the public interest standards reflected in the Communications Act. *Cable Television Service*, 37 Fed. Reg. 3252.¹⁵ The Commission also has promulgated new regulations with respect to the importation of distant television signals into the top one hundred television markets. *Id.* at 3262. Although these additional regulations are not before the Court in this case, they illustrate the Commission's intention to integrate cable systems which transmit broadcast

¹⁵ Copies of this report and order have been lodged with the Clerk of this Court.

signals into the national communications system in a way that will encourage use of all available communications technology in furtherance of the public interest standards embodied in the Communications Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,¹ and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communica-

¹ The provisions relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, 1st Session, approved and effective May 20, 1937, 50 Stat. 189.

tion by wire or radio and all interstate and foreign transmission of energy¹ by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.²

* * * * *

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and

² The words "the Philippine Islands or" preceding "the Canal Zone" are omitted on authority of Proc. No. 2695, effective July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, recognizing the independence of the Philippine Islands.

delivery of communications) incidental to such transmission.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of

the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any

international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 *Definitions*

(j) *Cablecasting*. The term "cablecasting" means programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

§ 74.1111 *Cablecasting in conjunction with carriage of broadcasting signals.*

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecast-

ing and has available facilities for local production and presentation of programs other than automated services: *Provided, further,* That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6-11 p.m.), for local programing designed to inform the public on controversial issues of public importance.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

~~74.1111 suspended~~

~~[§ 74.1111 suspended; III (68) 14]~~